IN THE SUPREME COURT OF TEXAS

NO. 04-1104

RICHARD FIESS AND STEPHANIE FIESS, APPELLANTS,

v.

STATE FARM LLOYDS, APPELLEE

ON CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued March 30, 2005

JUSTICE MEDINA, joined by JUSTICE O'NEILL, dissenting.

This case comes to us on a certified question from the United States Court of Appeals for the Fifth Circuit asking us to determine under what circumstances, if any, the "ensuing-loss" provision of the Homeowners Form B (HO-B) insurance policy[1] provides coverage for mold contamination. In answering that question, the Court concludes that mold can never be an ensuing loss within the meaning of that provision. The Court reasons that the ensuing-loss provision is not an exception to the excluded perils it modifies but rather an assurance that covered losses remain covered even when they ensue from an excluded peril. Because I believe that the ensuing-loss clause may also be read as an exception to the excluded perils it modifies, it is susceptible to more than one reasonable interpretation and is therefore ambiguous. As the Court acknowledges, such ambiguities must be construed in favor of the insured. Applying that rule of construction here requires that we answer yes to the question certified to us by the Fifth Circuit Court of Appeals. Because the Court does not,

[1] The specific policy at issue in this matter is the Homeowners Form B (HO-B) insurance policy as prescribed by the Texas Department of Insurance effective July 8, 1992, and revised January 1, 1996. Throughout this opinion, all references to "the policy" are references to the HO-B policy.

I respectfully dissent.

I

In 2001, the home of Richard and Stephanie Fiess sustained substantial flood damage from Tropical Storm Allison. When the Fiesses began removing drywall damaged by the flood, they discovered black mold growing throughout the house. The Fiesses sent samples of the mold to a laboratory for analysis. The examiner concluded that the samples contained hazardous stachybotrys mold, which, in his opinion, made the house dangerous to inhabit. Upon subsequent examination of the Feiss house, the examiner concluded that the flooding had caused some of the mold contamination, but a significant percentage of the mold had been caused by roof leaks, plumbing leaks, heating, air conditioning and ventilation leaks, exterior door leaks, and window leaks before the flood.

The Fiesses submitted a claim for mold damage under their homeowner's insurance policy, which explicitly excluded all damage caused by flooding. Their insurance carrier, State Farm Lloyds ("State Farm"), inspected the home and, under a reservation of rights, paid the Fiesses $34,425.00 for mold remediation in those areas of the home where evidence of small pre-flood water leaks existed. Under its reservation of rights, State Farm maintained that it was not obligated to pay for mold damage.

Believing State Farm's payment to be inadequate to remediate the mold damage not caused by the flood, the Fiesses filed suit in state court. State Farm thereafter removed the case to federal court, where it obtained a summary judgment. The federal district court concluded that the policy specifically excluded mold contamination from coverage and that the ensuing-loss provision had no effect upon this exclusion. The Fiesses appealed, arguing[2] that coverage for the mold at issue was

[2] The Feisses also argued that coverage should be extended to all mold contamination in their home caused by plumbing and HVAC leaks under another provision of the policy pertaining to the accidental discharge of water or steam from such systems. However, the Fifth Circuit concluded that the Feisses had waived the issue by failing to include it as a proper part of their appeal. 392 F.3d at 806.

extended under the policy's ensuing-loss clause. Concluding that the meaning of this clause was an unresolved question of state law important to both Texas homeowners and insurers and appropriate for decision by this Court, the Fifth Circuit certified the question to us.

II

We have previously considered the meaning of the "ensuing-loss" provision in an earlier version of the HO-B policy, but not in connection with mold damage. In *Lambros v. Standard Fire Insurance Co*., a home sustained structural damage when pressure from subsurface water caused the foundation to shift. 530 S.W.2d 138 (Tex. Civ. App.–San Antonio 1975, writ ref'd). Exclusion k of the homeowner's insurance policy excluded loss caused by foundation movement, but the policy's "ensuing-loss" provision stated that "Exclusions i, j, and k . . . shall not apply to ensuing loss caused by . . . water damage . . . provided such losses would otherwise be covered under this policy." *Id*. at 139. The homeowners argued that the damage to their foundation should be covered because the policy's ensuing-loss provision provided for recovery for losses caused by water damage. The court of appeals disagreed, holding that "'ensuing loss caused by water damage' refers to water damage which is the result, rather than the cause," of the excluded event; i.e., foundation movement. *Id*. at 141. The court explained that "[t]o 'ensue' means 'to follow as a consequence or in chronological succession; to result, as an ensuing conclusion or effect.'" *Id*. (quoting Webster's New International Dictionary 852 (2d ed, unabridged, 1959). Thus, "an ensuing loss caused by water damage is a loss caused by water damage where the water damage itself is the result of a preceding cause," the preceding cause being one of the named, excluded perils. *Id*. This interpretation suggests a three-step causal formula, requiring: (1) a preceding cause (one of the excluded perils) leading to, (2) a proximate cause (building collapse, water damage, or glass breakage) resulting in, (3) an ensuing loss. We likewise accepted this three-step analysis by refusing the writ in the case. *See State ex rel. McWilliams v. Town of Oak Point*, 579 S.W.2d 460, 462-63 (Tex. 1979) (notation "refused" indicates this Court's adoption of the court of appeals' judgment and opinion).

Lambros, however, only dealt with the first element of its three-step formula. Because the water damage was not caused by an excluded peril (the shifting foundation), the court held it was not covered under the ensuing-loss provision. Conversely, had the water damage been caused by an excluded peril, there might have been coverage if such loss would otherwise have been covered under the policy. *See Lambros*, 530 S.W.2d at 141.[3] But because there was no evidence of the requisite preceding cause, *Lambros* did not consider the balance of the provision; i.e., the types of damage an ensuing loss might include.

This Court has not mentioned *Lambros* since our refusal of the writ in that case more than thirty years ago. But the Court today again accepts its analysis of the ensuing-loss provision as correct, and I agree with this. ___ S.W.3d at ___. Moreover, although *Lambros* construed an earlier version of the HO-B policy, the ensuing-loss provision here is nearly identical to the former clause and should be construed similarly. But *Lambros* addresses only part of the ensuing-loss clause and therefore does not provide a complete answer to our present question. Having determined that the loss did not ensue from an excluded peril, *Lambros* did not consider the balance of the provision or purport to explain the meaning of a loss "otherwise . . . covered under this policy." To correctly define this type of loss, we must begin with the text of the ensuing-loss provision and the relevant exclusion to which it applies.

III

Section I-Exclusions, part 1.f. of the HO-B insurance policy provides:

f. **We do not cover loss caused by**:

---

[3] Lambros based its holding on two earlier cases which explained the meaning of "ensuing loss." *McKool v. Reliance Ins. Co.*, 386 S.W.2d 344, 345-346 (Tex. Civ. App.–Dallas 1965, writ dism'd) ("Giving to the words used [ensuing from] their ordinary meaning, we think it clearly appears therefrom that, although losses caused by extremes of temperature or cracking are not covered by the policy, all ensuing losses (meaning losses which follow or come afterwards as a consequence) caused by water damage are covered. In other words, the tile having cracked because of the extreme cold or ice, there could be no recovery therefor, but if water had entered through the cracks thus caused, the ensuing damage caused by the entry of the water would be recoverable."); *Park v. Hanover Insurance Co.*, 443 S.W.2d 940, 942 (Tex. Civ. App.-Amarillo 1969, no writ) (finding no coverage because exclusion at issue did not contain an ensuing-loss provision, but stating that ensuing loss is covered if it results from water damage caused by an excluded cause).

(1) wear and tear, deterioration or loss caused by any quality in property that causes it to damage or destroy itself.

(2) rust, rot, **mold** or other fungi.

(3) dampness of atmosphere, extremes of temperature.

(4) contamination.

(5) rats, mice, termites, moths or other insects.

We do cover ensuing loss caused by collapse of building or any part of the building, **water damage** or breakage of glass which is part of the building **if the loss would otherwise be covered under this policy**.

(emphasis added).

The Fiesses argue that the ensuing-loss provision is an exception to the mold exclusion designed to apply to any loss caused by covered water damage. According to the Fiesses, this provision restores coverage for mold caused by water damage, as long as the water damage itself is not excluded by one of the other provisions in the policy. State Farm, on the other hand, argues that the ensuing-loss provision merely reaffirms coverage when one of the listed excluded losses causes a secondary loss that would "otherwise be covered under this policy." Because loss caused by mold is expressly excluded, however, State Farm concludes that it cannot be considered "otherwise [] covered under this policy." Thus, State Farm interprets "otherwise covered" under the policy to negate the ensuing-loss clause by reinstating the exclusion to which it applies.

William J. Chriss, as amicus curiae, argues that neither party has it right. Amicus submits that the Feisses interpret water damage from the ensuing-loss provision too broadly, essentially ignoring *Lambros* and reading "ensuing" out of the provision. The amicus further argues that State Farm's circular interpretation of the provision ignores the meaning of the word "otherwise," thus depriving the provision of virtually any meaning. Amicus submits that the correct and more reasonable construction of "otherwise be covered" is that it refers to the remainder of the policy other than the paragraph under consideration. Thus, according to the amicus, water damage including

mold, which results from an excluded peril as *Lambros* requires, would be covered because such loss is not excluded anywhere else in the policy other than in paragraph f.

The Texas Department of Insurance, the author of the homeowner's policy at issue and the regulatory authority charged with ensuring compliance with state law in this area, also has filed an amicus brief that similarly disputes the Court's present policy construction. Even though mold itself is initially listed as an exclusion, the Department submits that it is nevertheless brought back into coverage by the ensuing-loss language of paragraph 1.f., which provides an exception to the exclusion for mold or other fungi if the mold loss ensues from a covered peril. The Department further rejects the Court's construction as rendering the ensuing-loss provision superfluous and concludes that the "provision can only be read to mean that despite any exclusion language, it includes coverage for certain previously excluded damage which is caused by a covered water loss."

Although I do not view this language to be as clear and unambiguous as the agency responsible for its inclusion in the policy, I do accept the Department's interpretation as an alternative reasonable construction. When the language of an insurance policy is capable of more than one reasonable interpretation, it is ambiguous, and when the ambiguity concerns an exclusionary provision, any uncertainty as to its meaning must be resolved in favor of the insured. *Nat'l Union Fire Ins. Co. v. Hudson Energy Co., Inc.*, 811 S.W.2d 552, 555 (Tex. 1991). Moreover, when language in a contract is capable of more than one reasonable interpretation, evidence extrinsic to the contract may be used to determine its intended meaning. *Nat'l Union Fire Ins. Co. v CBI Indus., Inc.*, 907 S.W.2d 517, 520-21 (Tex. 1995). Relevant Texas case law, as well as the history of the ensuing-loss provision itself, support the view of the amicus that "otherwise . . . covered" refers to parts of the policy other than the paragraph connected to the ensuing-loss provision.

Employers Casualty Co. v. Holm, 393 S.W.2d 363 (Tex. Civ. App.– Houston 1965, no writ), was the first Texas case to apply the provision in this manner. There, the excluded peril of inherent-vice was the preceding cause of water damage to a home. A shower in the home was built without

a shower pan (an inherent vice) and the ensuing leak caused the wooden flooring to rot and deteriorate. After holding that the negligence of the contractor did not destroy the accidental nature of the loss, the court examined the inherent-vice exclusion and concluded that water damage ensuing from the excluded cause was covered under the ensuing-loss exception because it was not excluded elsewhere in the policy. The court held that any loss caused by water damage ensuing from an excluded cause is covered under the policy if: 1) the excluded cause has an ensuing-loss exception, and 2) such water damage is not of a type otherwise excluded under a separately enumerated exclusionary paragraph, such as damage from surface water or naturally occurring ground water; i.e., another exclusion in the policy at issue. *Holm* thus held that "otherwise covered" meant caused by a type of water damage not excluded by other exclusions containing no ensuing-loss provisions. *See also Allstate Ins. Co. v. Smith*, 450 S.W.2d 957 (Tex. Civ. App.–Waco 1970, no writ) (following *Holm*).

Similarly, in *Park v. Hanover Ins. Co.*, 443 S.W.2d 940, 942 (Tex. Civ. App.– Amarillo 1969, no writ), the court stated that an ensuing loss is covered if it results from water damage and is not otherwise excluded under a different exclusionary paragraph. The court, however, found no coverage because the exclusion at issue did not contain an ensuing-loss provision.

Other courts have taken a more expansive view of the ensuing-loss provision, suggesting that it means nothing more than that the occurrence happened during the policy period, the insured complied with all conditions precedent and the like, and that all ensuing damage should therefore be covered. *See, e.g., Burditt*, 86 F.3d at 477 (ensuing-loss provision extends coverage to all loss ensuing from an excluded peril); *Merrimack Mut. Fire Ins. Co. v. McCaffrey*, 486 S.W.2d 616, 620 (Tex. Civ. App.-Dallas 1971, writ ref'd n.r.e.) (mold caused by water damage ensuing from an excluded peril is covered if the excluded initial cause has an ensuing-loss provision); *McKool*, 386 S.W.2d at 345-46 ("[A]lthough losses caused by extremes of temperature or cracking are not covered by the policy, *all ensuing losses* . . . caused by water damages are covered.") (emphasis added). The

history of the ensuing-loss provision, however, indicates that *Holm's* more restrictive application of the provision is the correct one.

Before 1990, the HO-B policy included one ensuing-loss provision placed at the end of the policy section listing eleven exclusions, a - k. Exclusion i in this list excepted from coverage:

> i. Loss caused by inherent vice, wear and tear, deterioration; rust, rot, mould or other fungi; dampness of atmosphere, . . .;
>
> j. * * *
>
> k. * * *
>
> **The foregoing** Exclusions a through k shall not apply to ensuing loss caused by fire, smoke or explosion and **Exclusions i, j and k [exclusions f, g, and h in the Fiesses' policy] shall not apply to ensuing loss caused by** collapse of building, or any part thereof, **water damage . . ., provided such losses would otherwise be covered under this policy**.

See Lambros, 530 S.W.2d at 139 (emphasis added). In 1990, several exclusions were moved to different paragraphs, and the letters identifying them were changed accordingly. Paragraph i (which had excluded losses caused by rust, rot, mold and several other causes) became paragraph f, paragraph j (which had excluded losses cause by animals owned by the insured) became paragraph g, and paragraph k (which had excluded losses caused by settling foundation) became paragraph h. The ensuing-loss provision was attached to each of the renumbered paragraphs. These revisions were not intended to restrict or change the scope of coverage[4] but merely to simplify the policy, making it easier to read. *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741-42 (Tex. 1998).

Although simplification was the intended purpose, the 1990 revisions have perhaps had the opposite effect. Before 1990, it seemed apparent that the "otherwise covered under this policy" language of the ensuing-loss provision referred to provisions of the policy other than those it

[4] At the time of these revisions, State Farm apparently acknowledged that a covered water damage claim included mold: "State Farm agrees to extend the coverage for water damage in the same manner as provided in the HO-B. . . . Specifically, State Farm extends coverage for reasonable and necessary repair or replacement of property physically damaged by a covered water loss which damage shall include mold." Tex. Dep't of Ins., *Official Order No.* 02-0208, at 10-11; *see also* Tex. Dep't of Ins., *Comm'rs Order No*. 01-1105 (Adoption Order dated November 28, 2001; Docket No. 26, p. 191-189.

identified as applicable. Thus the pre-1990 policy expressly stated that the ensuing-loss provision superceded exclusions i, j and k (now exclusions f, g and h). The remaining exclusions to which it did not apply were not superceded; i.e., now exclusions a (loss to electrical devices), b (industrial smoke), c (contents windstorm losses), d (theft), e (mechanical breakdown), i (flood and surface water), j (freeze), and k (landslide or earthquake). In other words, if a peril excluded by paragraphs f (wear and tear, inherent vice, deterioration, rust, rot, mold, dampness, contamination), g (animals kept by the insured), or h (foundation movement) causes water damage, then the water damage ensuing from the excluded peril is covered "if the loss would be otherwise covered under this policy" (i.e., if the loss is not excluded in some other way by some other exclusions other than f, g and h). Because no change in coverage was intended by the 1990 revisions, that same analysis should hold true today. *Balandran*, 972 S.W.2d at 741-42.

III

In conclusion, I would answer the question posed by the Fifth Circuit Court of Appeals, yes, because the ensuing-loss clause may reasonably be read as an exception to the mold exclusion. The Fifth Circuit offered the following practical application of the provision which I think is correct as I have modified it below:

> An example of the practical application of this "preceding cause-proximate cause-ensuing loss" formulation is as follows: Rust, an excluded form of damage, causes a pipe to burst. The damage to the pipe is clearly excluded under the policy exclusion for rust. However, any damage resulting or ensuing from the water that escapes as a result of the rust will be covered under the ensuing-loss provision [so long as the loss is not excluded by some other provision of the policy other than an exclusion with an ensuing-loss provision; i.e., paragraphs f, g, and h]. Plugging these facts into the formulation results in the following: the rust eating through the pipe constitutes the preceding cause; the water escaping from the pipe constitutes the proximate cause; and the damage caused by the escaping water constitutes the ensuing loss.

392 F.3d at 810 n. 30 (as modified). In other words, the Texas Standard HO-B policy provides coverage for losses, including mold, caused by water damage ensuing from any of the perils listed in paragraphs 1.f, 1.g, or 1.h, so long as such damage is not excluded by some other provision of the

policy besides these three paragraphs. Because the Court concludes that this is not a reasonable alternative interpretation of the ensuing-loss provision and that the provision is therefore not ambiguous, I respectfully dissent.

David M. Medina
Justice

Opinion delivered: August 31, 2006